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No. 72948-9-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

In Re: The Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,

Appellant

v.

LAUREN SELIG, MARTIN SELIG and TEMPLE DE HIRSCH SINAI,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John R. Ruhl)

ANSWERING BRIEF OF RESPONDENT TEMPLE DE HIRSCH SINAI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

The superior court did not err by denying Ms. Braun's Petition to Reinter the Remains of Kyril Faenov. First, the relevant statutes provide the surviving spouse, Lauren Selig, the exclusive, continuing right to control the remains of her husband. Both cemeteries and grieving family members must be able to rely upon the statutory hierarchy laid out by the Legislature, and deserve the security that their bargained for contractual rights will be honored, especially in such a sensitive and personal context. The Legislature has clearly commanded that courts should not disturb the agreements made between a grieving spouse and a cemetery authority to provide a final resting place for the remains of deceased loved ones. Second, even in the absence of these statutes, the equitable common law in Washington and other states does not support reinterment in these circumstances. In the absence of a compelling equitable necessity, Kyril Faenov's remains must be left to rest where his wife chose to inter him. Any other result would destroy the statutory hierarchy of decision-making set forth in Chapter RCW 68.50 and would result in repeated attempts by other family members to override the decisions of those with whom our Legislature has vested authority over their next of kin's remains. RCW 68.50.160 and RCW 68.50.200 must be construed in harmony; it makes no sense for the Legislature to have invested the surviving spouse with

exclusive authority regarding interment decisions under RCW 68.50.160, while allowing other family members to ignore the statutory hierarchy of RCW 68.50.200 and seek court relief from decisions they do not like after the decedent has been interred. Both cemeteries and family members should be able to rely upon the statutory framework in order to be secure that their decisions and corresponding contracts will be honored. The court does not have authority to override Ms. Selig's decisions in these circumstances.

The superior court also did not err by denying Ms. Braun's Motion for Additional Discovery because the discovery she sought would not change the outcome of this case. Any facts disputed in this case were not material to the questions before the Court: (i) whether the superior court had authority to decide this case on the "level playing field of competing equities" argued by Ms. Braun; and (ii) if so, whether there was an equitable necessity to override the choices made by the surviving spouse. First, the facts relating to the statutory arguments are not in dispute, so additional discovery will not affect the court's decision. Second, Ms. Braun has not alleged facts sufficient to establish an equitable reason to reinter her son's remains, so no amount of discovery will justify judicial intervention in this matter.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly grant summary judgment when there is no genuine issue of material fact and, as a matter of law, Lauren Selig has an exclusive, continuing right under RCW 68.50.160 and RCW 68.50.200 to control the disposition of her husband, Kyril Faenov's remains?
2. Did the trial court properly exercise its discretion when it ruled that the equitable considerations argued by Ms. Marina Braun do not justify reinterment of Mr. Faenov's remains, where the facts, circumstances and equities argued by Ms. Braun in her Petition and briefing do not demonstrate a necessity or a compelling equitable reason to disturb the surviving spouse's decision?
3. Did the trial court abuse its discretion when it denied Ms. Braun's request for discovery under Civil Rule 56(f) on that grounds that discovery would not have been material to the Court's resolution of the issues presented by Ms. Braun's Petition?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

The following facts are undisputed. Kyril Faenov and Lauren Selig met in Seattle and began dating in early 2000. (CP at 132-33.) In

the summer of 2003, they were married at the Scimatar Ridge Ranch in Anacortes. (CP at 133.) In 2002 they bought a house in the Madison Park neighborhood and continued to live and work in Seattle throughout their marriage. (CP at 133.) Their two daughters were born in Seattle in 2005 and 2009. (CP at 133.)

On May 25, 2012, Mr. Faenov committed suicide. (CP at 133.) Ms. Selig selected the Hills of Eternity Cemetery, operated by Temple De Hirsch Sinai ("TDHS"), in Queen Anne and made the arrangements for her husband's funeral. (CP at 133.) Ms. Selig's father, Respondent Martin Selig, entered into an Interment Agreement with TDHS to obtain "the right of perpetual interment" for Mr. Faenov in the Hills of Eternity Cemetery. (CP at 137.)

In Jewish tradition, a headstone is not added to the gravesite for the first year after death. (CP at 135.) In late September of 2013, some of Kyril's friends placed a headstone on Kyril's grave without obtaining consent from Ms. Selig. (CP at 37-38.) This headstone was later removed. (CP at 5.) In March 2014, Kyril's mother, Marina Braun, visited her son's grave and was distressed to find it unmarked. (CP at 18.) She subsequently filed a petition to have her son's remains removed from the Hills of Eternity Cemetery and moved to a cemetery in Portland,

Oregon. (CP at 1.) Kyril's grave is currently marked with a headstone installed by Ms. Selig. (CP at 152.)

B. Procedural Background

Ms. Braun filed her Petition to Reinter on June 26, 2014. (CP at 9.) Respondents Ms. Selig and Mr. Selig, later joined by TDHS, subsequently filed a Motion to Dismiss Ms. Braun's Petition. (CP at 84-100, 375.) Ms. Braun filed a Motion to Continue, arguing that the Motion to Dismiss should be considered as a motion for summary judgment, and that more time was needed for discovery.[1] (CP at 141.) A continuance was granted on August 26, 2014, (CP at 283), and Ms. Braun subsequently filed her Opposition to the Motion to Dismiss, including a request for discovery pursuant to CR 56(f). (CP at 404.)

The Seligs, joined by TDHS, then filed a Motion for Protective Order Staying Discovery, arguing that the requested discovery would be burdensome and unnecessary. (CP at 262-63.) This Motion was granted on September 8, 2014. (CP at 354.) At that time, the court further ordered that the parties provide supplemental briefing in response to four questions relating to the parties' statutory and contractual arguments, as well as the argument that Ms. Braun waived her right to object to the placement of her

[1] Although the motion was styled a "Motion to Dismiss," the parties subsequently treated it as a motion for summary judgment pursuant to CR 56. RP at 6:24; 20:12-16.

son's remains by participating in his funeral. (CP at 356-57.) The parties adressed these questions through supplemental briefing to the court. (*See* CP at 368-74 (Seligs); CP at 375-84 (TDHS); CP at 531-47 (Ms. Braun).)

On November 21, 2014, the parties presented oral arguments on the defendants' motion. The court granted the Respondents' motion and denied Ms. Braun's Petition to Reinter. (RP at 44:11-12.) In so ruling, the trial court determined that, although the Interment Agreement does not prevent it from exercising judicial authority to provide substitute consent, the facts and circumstances of this case, as argued by Ms. Braun, did not present a compelling equitable reason to do so. (RP at 47:9-23.)

IV. ARGUMENT

A. Standard of Review

An appellate court reviews a grant of summary judgment de novo and engages in the same inquiry as the trial court. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). The court views the evidence in the light most favorable to the nonmoving party and sustains the summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The court must view all facts and reasonable inferences in the light most favorable to the non-moving party, but "[s]uch facts must move beyond

mere speculative and argumentative assertions." *Adams v. King Cnty.*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008) (citing *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612–13, 62 P.3d 470 (2003)).

A trial court's denial of a motion for discovery pursuant to CR 56(f) is reviewed for abuse of discretion. *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). A court abuses its discretion only if "no reasonable person would take the position adopted by the trial court." *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 182 Wn.2d 519, 531, 342 P.3d 308 (2015).

B. Based on the Facts Alleged and Arguments Made in Ms. Marina Braun's Petition, And As a Matter of Law, Ms. Braun Cannot Override Ms. Lauren Selig's Legal Right to Control Her Husband's Remains

Under Washington law, the next of kin (in this case, the surviving spouse) has the legal right to protect and preserve the remains of the decedent, including the right to choose the place of interment *and to maintain that choice*. *See* RCW 68.50.160; RCW 68.50.200; *Herzl Congregation v. Robinson*, 142 Wash. 469, 473, 253 P. 654 (1927). Human remains may be moved from their resting place only with the consent of both the cemetery authority and the next of kin, as defined in the statutory hierarchy. RCW 68.50.200. The court has limited authority

to provide substitute consent for one or both of these parties, but only if the appropriate parties are not available to provide consent, and only if providing substitute consent would not violate the terms of a written agreement. *Id.* Ms. Selig, as the next of kin, holds the statutory and common law right to control her husband's remains. She has chosen to keep her husband's remains in the grave she selected for him, and that choice cannot be challenged by another family member who is unhappy with her decisions. Simply put, the legislative scheme rejects a "level playing field" as between the primacy accorded the surviving spouse under the statute and a challenging family member who wishes to undermine that choice by seeking relief from a trial court. The court does not have the statutory authority to override her wishes because she is available and has declined to consent, and because doing so would violate the terms of the written Interment Agreement. RCW 68.50.200.

1. Principles of Statutory Interpretation

The object of statutory interpretation is "to ascertain and give effect to the intent of the legislature." *Hartman v. Washington State Game Comm'n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975). To accomplish this, the Court must first look to the plain meaning of the statutory language. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). If the meaning of the statute is clear on its face, then that plain meaning must

be given effect. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn. 2d 444, 451-52, 210 P.3d 297 (2009). Courts must "give effect to all language, so as to render no portion meaningless or superfluous." *Rivard*, 168 Wn.2d at 783.

As a general rule, "[t]he common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." RCW 4.04.010. Thus, when interpreting a statute that addresses the same subject matter as the prior common law, the Court must ascertain whether the statute was in fact intended to change the common law. *Wichert v. Cardwell*, 117 Wash. 2d 148, 154, 812 P.2d 858, 861 (1991) (citing RCW 4.04.010). Where the statute was clearly designed as a substitute for the prior common law, the statute must be construed in accordance with its plain meaning. *State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas Cnty.*, 83 Wn. 2d 219, 221-22, 517 P.2d 585, 587 (1973).

If the court finds that the language of the statute may be given more than one reasonable interpretation, then it may look to legislative history to determine the statute's meaning. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). In order to ascertain the legislative intent behind a statute, the Court must consider the state of the law prior to

the statute's adoption. *State ex rel. Madden*, 83 Wn. 2d at 221; *see also Peet v. Mills*, 76 Wash. 437, 439-40, 136 P. 685 (1913). "It is a general rule of interpretation to assume that the legislature was aware of the established common law rules applicable to the subject matter of the statute when it was enacted." *State ex rel. Madden*, 83 Wn. 2d at 221. The court will also consider clearly stated or previously existing public policy concerns when interpreting an ambiguous statute. *Sedlacek v. Hillis*, 145 Wn.2d 379, 389-390, 36 P.3d 1014 (2001).

2. Ms. Selig Has the Statutory Right to Control the Remains of Her Husband, Mr. Kyril Faenov

Washington statutory and equitable common law both provide that the next of kin, in this case, the surviving spouse, has the right to control the remains of a loved one. *See* RCW 68.50.160; *Herzl Congregation*, 142 Wash. at 473. This right "is not only a natural right, embracing a high order of sentiment," but is now well recognized as a legal right. *Guilliume v. McCulloch*, 173 Wash. 694, 696, 24 P.2d 93 (1933). Although it arose at common law, it has since been codified in the laws of many states, including Washington. *Herzl Congregation*, 142 Wash. at 471 (citing Rem. Comp. Stats. § 6042).

The current statutes at issue, RCW 68.50.160 and RCW 68.50.200, were passed into law *together* in 1943. *See* General Cemetery Act, Laws

of 1943, ch. 247, § 29, 1943 Wash. Sess. Laws 743, 746 (originally codified at Rem. Supp. 1943, § 3778-29). First, this statutory language is clear and must be given effect. *See HomeStreet*, 166 Wn. 2d at 451-52. These statutes provide that, in the absence of prearrangements made by the decedent, both the right and the duty to control the disposition of the remains of a deceased person vest in a hierarchy of persons. RCW 68.50.160. Unless the decedent designated another person in writing, the right and duty to control the disposition of the decedent's remains vest first in the surviving spouse. RCW 68.50.160(3)(c). It would be absurd to imagine that our Legislature adopted a scheme under which the surviving spouse controls initial disposition pursuant to RCW 68.50.160, but that, immediately following interment, another family member is authorized by RCW 68.50.200 to approach the court seeking "substitute consent" to change that disposition.

Second, any ambiguity regarding the extent of the right conferred by this statute should be resolved by looking to the legislative history. *Christensen*, 162 Wn.2d at 373. This necessarily involves an analysis of the prior common law that the Legislature is presumed to have considered. *See State ex rel. Madden*, 83 Wn. 2d at 221. Under Washington common law, "the right to bury a corpse and to preserve its remains . . . belongs

exclusively to the next of kin." *Herzl Congregation*, 142 Wash. at 473; see also *Guilliume*, 173 Wash. at 697 (quoting *Herzl*).

The next of kin is also said to have a quasi-property right to the body itself, both before and after burial. *Guilliume*, 173 Wash. at 697; *Herzl Congregation*, 142 Wash. at 472. The next of kin holds the right to choose a place of interment, and to change that place at will. *Guilliume*, 173 Wash. at 697; *Herzl Congregation*, 142 Wash. at 473.

Because the common law in Washington provides the surviving spouse the "exclusive" right to determine the disposition of remains and explicitly states that this right continues after burial, the right conferred by the statue should also be understood as an exclusive, continuing right; the language of the statue does nothing to abrogate that common law principle. *See* RCW 4.04.010. At the minimum, cemeteries should be able to rely on the surviving spouse's continuing control and authority over the placement and disposition of a decedent who has been placed at rest in that cemetery, without challenges based on a different relative's unhappiness with those choices. As the surviving spouse, Ms. Selig has the express statutory right to control the disposition of her husband's remains. Therefore, the court should not disturb the remains of Mr. Faenov from the resting place chosen for him by his wife.

3. The Plain Meaning of RCW 68.50.160 and RCW 68.50.200 Require the Consent of the Surviving Spouse, Ms. Selig, and the Cemetery Authority to Any Reinterment

Permission to move remains once they are interred is governed by RCW 68.50.200. The statute provides that "[h]uman remains may be removed from a plot in a cemetery with the consent of the cemetery authority *and* the written consent of one of the following *in the order named.*" RCW 68.50.200 (emphasis added). This does not mean that any person on the list may provide consent, but rather that the first person on the list who is available, holds the right to grant or deny consent. Cemeteries throughout the state should be able to continue to rely on the statutory hierarchy created by our Legislature for consent to removal, without their contracts of interment being subject to challenge by other family members.

By its plain meaning, this statute requires the consent of both the cemetery authority *and* the next of kin, as defined by the same statutory hierarchy used in RCW 68.50.160. Ms. Braun argues that, when a person on the list declines to provide consent, the court may continue down the list until a person does grant the required consent, effectively overriding the decision-making power of the next of kin who refused. (CP at 7.) Ms. Braun misconstrues the plain language of the statute, which specifies the order in which persons may provide the necessary consent. *See* RCW

68.50.200. To allow any listed person to provide consent, or to allow someone to seek court approval over the objection of the person with the statutory hierarchy, would rewrite the statute to exclude this specification that consent must be obtained from one of the following *in the order named. See id.*

Ms. Braun's interpretation is also unsupported by the case law. She cites *Wood v. E.R. Butterworth & Sons*, 65 Wash. 344, 118 P. 212 (1911), for the proposition that the superior court may decide in equity that another family member may reinter the remains over the wishes of the surviving spouse. This argument mischaracterizes both the decision's precedential value and the court's holding.

First, Washington law has changed since *Wood* was decided in 1911 with the passage of the laws now codified at RCW 68.50.160 and RCW 68.50.200. The court in *Wood* relied entirely upon the common law, and did not have the benefit or constraints of the statutes as currently enacted. *See Wood*, 65 Wash. at 347. Ms. Braun's reliance on the court's decision is therefore misplaced.

Second, the court's decision was based on the clearly expressed wishes *of the deceased*, and was not an equitable decision that the sons' wishes should trump those of the surviving spouse. *Id.* at 349. The case involved a dispute between the surviving spouse and the surviving sons.

Id. at 344. The spouse wished to bury the decedent in Seattle. *Id.* at 349. The sons wished to bury the decedent in South Dakota where their father had lived his life and made his career. *Id.* at 344-47. The deceased was a prominent public figure in the State of South Dakota where he had been mayor of his hometown four times, prosecuting attorney several terms, a member of the constitutional convention for the state, and the democratic candidate for governor of the state. *Id.* at 345. In numerous public speeches, as well as in private conversations and letters, he consistently expressed that he was and would remain a citizen of South Dakota and that he intended to be buried in South Dakota. *Id.* at 345-46. In deciding the case, the court acknowledged the common law rule that the surviving spouse has the exclusive right to control the remains of her husband, and articulated that it was not giving preference to the wishes of the deceased's sons over the wishes of his surviving spouse. *See id* at 349. Instead, the court gave preference to "the will of the deceased" as ascertained "by a clear preponderance of the evidence," finding that *the deceased* had clearly expressed his own hope and intention to be buried in his home of South Dakota. *Id.* at 348-49. The court held that the deceased's desires should control the disposition of his own remains. *Id.* In this case, the statute provides that Ms. Selig has priority to decide, but even if *Wood* has precedential value in an equitable determination, Ms. Braun has not

alleged that Kyril Faenov clearly expressed his own hope and intention of being buried near his mother in Portland.

Ms. Braun also cites *Bellevue Masonic Temple, Inc. v. Lokken*, 75 Wn.2d 537, 537-38, 452 P.2d 544 (1969). (CP at 7.) This case also is inapposite, however, because the representative who objected to the procedures for reinterment was not one of the statutorily enumerated next of kin, so the Court was not bound by the RCW 68.50.200 and instead was required to look to the common law in the absence of a statutory directive. *See* RCW 4.04.010. In addition, the issue before the court in *Bellevue Masonic*, was whether located heirs of a family buried on the property had the right to select the reinterment site of their family members. *Bellevue Masonic*, 75 Wn.2d at 538. Thus, the court did not consider whether reinterment was proper under RCW 68.50.200, but used equitable considerations only to determine whether the proposed procedures for selecting a new burial place were adequate in the absence of statutory authority. *Id.*

As a matter of public policy, Washington's common law and legislative scheme vigorously defend the longstanding natural right of the next of kin to control the disposition of remains. Allowing any person on the list to override persons listed with priority would vitiate the natural right of the next of kin to control the remains of a loved one. In light of

the common law history behind this statute, the Legislature would not have intended this result. Therefore, the statute should be read, not to mean that any family member can seek court approval in lieu of the necessary consent, but to define the next of kin, who has the statutory right to provide *or withhold* consent to remove the remains of a loved one. Only Ms. Selig, as the surviving spouse, can provide consent; only Ms. Selig has the right to make decisions regarding the continued disposition of her husband's remains.

4. The Court's Limited Authority to Provide Substitute Consent Does Not Apply Under These Circumstances Because Ms. Selig is Available and Has Declined to Consent

Under the statute, a court does have limited authority to provide substitute consent, but the exercise of such authority is not appropriate in these circumstances. The statute provides that "[i]f the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient." RCW 68.50.200. This provision defines the extent of the court's limited authority to provide substitute consent.

First, a plain reading of the statute indicates that the court does not have the authority to override the wishes of the cemetery and the next of kin when they are aligned; it may only intervene when the required

consent *cannot be obtained.* The only case in which the court has authorized reinterment pursuant to this statute is *Bellevue Masonic*, 75 Wn.2d 537, 537-38, 452 P.2d 544 (1969). In *Bellevue Masonic*, there was a reasonable necessity for the court to provide consent because the statutorily enumerated next of kin were all unavailable. *Id.* at 538. Therefore, *Bellevue Masonic* provides little or no instruction to this court because it is undisputed that Ms. Selig has been available and engaged in decisions involving the disposition of her husband's remains, including the decision to withhold consent to reinter his remains. Thus, this is not a case in which consent *cannot be obtained* within the meaning of the statute.

Ms. Braun argues that the statutory context supports her interpretation of the statute because the following statute, RCW 68.50.210, provides that notice of a petition for reinterment must be provided "to the cemetery authority and to the persons not consenting, and to every other person on whom service of notice may be required by the court." RCW 68.50.210. This argument, however, fails to take into account all the circumstances in which it may be necessary to notify non-consenting parties within the statutory hierarchy. For example, when parents disagree about the proper disposition of a child's remains, or when siblings cannot agree about the proper resting place for a deceased parent, the statutory hierarchy described by RCW 68.50.200 does not specify which parent or

which sibling should be given preference over another. *See, e.g.*, *Woods v. Woods*, 48 Wn. App. 767, 769, 740 P.2d 379 (1987). Unlike situations involving surviving parents or siblings, there can be only one surviving spouse. The statute specifies that, when there is a surviving spouse, that one person must be given preference over all others concerning the disposition of remains.

Whether or not the Court finds that this provision allows the superior court to provide substitute consent under certain circumstances, the provision should not be read to allow Ms. Braun to override the wishes of Ms. Selig, even based on Ms. Braun's assertion that her choices for Mr. Faenov's remains are somehow "better than" Ms. Selig's. To do so would render the statutory hierarchy meaningless. The Legislature would not have specified the order of persons if it intended for any family member's consent to suffice, or if it intended in RCW 68.50.200 to abrogate the hierarchy established under RCW 68.50.160, and allow someone "lower" on the list to seek court approval to override the decisions of someone "higher" on the list. As traditionally understood in the common law, and as codified in RCW 68.50.160 and RCW 68.50.200, the next of kin has the right to control the remains of a loved one. As the surviving spouse, Ms. Selig holds that right. Cemeteries throughout Washington are entitled to

rely on the continuing nature of the next of kin's authority continuing beyond initial interment.

5. The Court's Limited Authority to Provide Substitute Consent Does Not Apply Under these Circumstances Because it Would Violate the Terms of the Interment Agreement Between Mr. Martin Selig and Temple De Hirsch Sinai

The statute also limits the court's authority when contractual rights are at stake. The statute explicitly provides "[t]hat the permission [by the superior court] shall not violate the terms of a written contract or the rules and regulations of the cemetery authority." RCW 68.50.200. This language is clear and should be given effect. If the terms of a written contract would be violated, the court cannot provide substitute consent. In that situation, remains may be moved only with the consent of the cemetery authority and the statutorily defined next of kin.

Furthermore, as a policy matter, the Legislature surely did not intend for the courts to undermine the rights and obligations created by contracts without adequate justification. The Washington Constitution protects the bargained for rights and obligations of contracts. Const. art. I, § 23 ("No . . . law impairing the obligations of contracts shall ever be passed."). Particularly in the context of interment agreements, both cemeteries and grieving family members should be able to rely on their agreements. Family members are bargaining for a *final* resting place for

their loved ones, and cemeteries must be able to represent that, under circumstances such as those presented by Ms. Braun's Petition, those agreements will be honored in perpetuity. If the court has the authority to override interment agreements, based on petitions by those seeking different arrangements, the public would lose faith in the enforceability of these contracts. The next of kin will have to wonder whether a future family dispute will result in the court ordered disturbance of their family member's resting place. The court should not interfere with the bargained for rights and obligations held by the parties to interment agreements.

The superior court interpreted this provision to apply only to prevent the court from allowing a party to a written contract to violate the terms of that contract. RP at 46:3-18. This interpretation reads additional language into a statutory provision that is otherwise clear, and weakens the protections specified by the Legislature. Allowing a court to nullify the terms of a written contract at the request of a stranger to that contract violates the rights of the parties to that contract.

Here, it is undisputed that Mr. Selig entered into a written Interment Agreement with TDHS to obtain "the right of perpetual interment" in the Hills of Eternity Cemetery. (CP at 21.) Ms. Braun argues that court-authorized disinterment of Mr. Faenov's remains would not violate the Interment Agreement because the Interment Agreement

does not expressly prohibit disinterment. (CP at 400-02.) This interpretation undersells the rights bargained for in such an agreement. Mr. Selig bargained for "perpetual interment;" TDHS bargained for its own ability to continue to provide the chosen place of rest chosen. In this case, Ms. Selig and TDHS are in agreement that Mr. Faenov's remains should not be removed from the resting place chosen by Ms. Selig. Allowing the court to overrule their wishes would violate the terms of the written agreement between Mr. Selig and TDHS that granted Mr. Selig the right of perpetual interment for Mr. Faenov's remains. If the court allows Ms. Braun to remove Kyril's remains, both Mr. Selig's and the Cemetery's bargained for rights will be violated.

C. Even if the Court has Equitable Authority to Override the Decision of the Surviving Spouse, the Facts and Circumstances, Even as Alleged by Ms. Braun, Do Not Justify Reinterment in this Case

Even in the absence of the statutory framework, Washington equitable common law supports three principles. First, as discussed above, the next of kin has the natural and exclusive right to make decisions regarding the continued disposition of a loved one's remains, and this right does not diminish over time. *Guilliume*, 173 Wash. at 697; *Herzl Congregation*, 142 Wash. at 472. The right to choose the place of burial includes the right to change that place "at will." *Herzl*

Congregation, 142 Wash. at 473. Furthermore, the quasi property right in the body exists both before and after burial. *Guilliume*, 173 Wash. at 697.

Second, these rights are vigorously defended by the courts. *See Guilliume*, 173 Wash. at 697 (finding interference with the right of the next of kin to plan the funeral and burial "reprehensible"). Washington courts allow the wishes of the surviving spouse to be overruled only when there is clear evidence that the choices made are contrary *to the decedent's wishes*. *See Wood*, 65 Wash. at 348. "In the absence of authority, express or implied, or of reasonable necessity, those not having a legal right must refrain from interfering" with the right of the next of kin to control the remains of a loved one. *Id.* As discussed above, the *Wood* decision demonstrates the quantum of evidence required to justify overriding the wishes of the next of kin. *See generally id.* Not only must there be evidence that the deceased would have wished for a different burial, but the deceased must have clearly expressed that desire and the court must find that desire to have been sincere. *Id.* at 348. In such a case, the controversy should be resolved in favor of honoring the wishes of the decedent, not the wishes of another family member. *See generally id.*

Third, in the absence of a reasonable necessity, equity supports leaving the remains where they have been laid. *See Woods*, 48 Wash. App. at 769. In a dispute between two parents, the mother wished to move

the cremated remains of their son eleven months after they had been placed in the chosen resting place. *Id.* at 768. The court looked first to the statutory hierarchy, but, because the parents shared the statutory right to possess the remains, the court had to resolve the dispute between them. *Id.* at 768-69. Though the trial court had ordered the remains returned to the mother, the appellate court reversed and ordered that the remains should be left in the place originally agreed to by the parents. *Id.* Because there was no evidence why one parent should be given preference over the other, the court opted to leave the remains undisturbed. *Id.* The right of the next of kin to control the remains of a loved one may be interfered with only if there is express or implied authority to do so, or a "reasonable necessity" to do so. *Guilliume*, 173 Wash. at 697.

Because Washington common law does not support her claim, Ms. Braun looks to the law of other states in an attempt to claim that the equitable considerations favor reinterment. (*See* CP at 8.) This reliance is misplaced because the law of other states has no precedential effect on Washington courts, and because the case law cited by Ms. Braun does not support reinterment in this case. First, out-of-state precedent should not trump binding in-state law and, at most, is persuasive when Washington courts have yet to address an issue. *Am. Best Food, Inc. v. Alea London,*

Ltd., 168 Wn.2d 398, 408, 229 P.3d 693 (2010), as corrected on denial of reconsideration (June 28, 2010).

Second, the cases Ms. Braun cites in her petition are strikingly different from the case at hand. In one, the court held that the surviving spouse did not hold the right to determine the disposition of her husband's remains when she "did not live with him for the eleven years preceding his death," "never came to see him during his last illness," and "did not attend his funeral." *In re Mushel*, 125 N.Y.S.2d 130, 131 (1953). In the second, the court held that the surviving spouse would not be permitted to demand reinterment of his wife's remains because the court believed he was using the threat of disinterment to blackmail his wife's parents for money to pay gambling debts. *Spanich v. Reichelderfer*, 90 Ohio App. 3d 148, 150 (1993). Even if either of these cases were authority in Washington, they are easily distinguishable.[2]

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[2] The Washington cases Ms. Braun cites for the proposition that the court must analyze the specific facts of each case, including the conduct of the parties, in order to weigh the equities in every case, are not applicable or instructive here. *See e.g.*, Appellant's Opening Br. 22 n.17, 27-28. (citing *Ferrell v. Lord*, 43 Wash. 667, 86 P. 1060 (1906); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001) (en banc); *Honey v. Davis*, 131 Wn.2d 212, 224, 930 P.2d 908 (1997) (en banc); *Hemenway v. Miller*, 116 Wn.2d 725, 734, 807 P.2d 863 (1991) (en banc)). None of those cases involved the disruption of the statutory priority afforded to a spouse to make decisions regarding the remains of a deceased spouse. *See Ferrell v. Lord*, 43 Wash. 667, 86 P. 1060 (1906) (regarding an equitable action to quiet title); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001)

Ms. Braun further cites two equitable factors from other jurisdictions that she alleges should have been considered in this case: where other members of the decedent's family are buried, and the strength of the relationship between the interested parties and the decedent. (CP at 21-24. First, for the proposition that reinterment can be justified on the

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(en banc) (regarding ownership of property obtained during an alleged meretricious relationship); *Honey v. Davis*, 131 Wn.2d 212, 224, 930 P.2d 908 (1997) (en banc) (regarding the existence of a principal-surety relationship); *Hemenway v. Miller*, 116 Wn.2d 725, 734, 807 P.2d 863 (1991) (en banc) (regarding the impairment of collateral).

Similarly, the non-Washington authority upon which Ms. Braun relies is distinguishable and not instructive here. *See* Appellant's Opening Br. 22-24 (citing *In re Disinterment of Frobose*, 163 Ohio App. 3d 739, 743 (2005); *Novelli v. Carroll*, 278 Pa. Super. 141, 147 (1980); *Spadaro v. Catholic Cemeteries*, 330 N.W.2d 116, 118-119 (Minn. 1983); *Tozer v. Warden*, 101 Ark. App. 396, 399 (2008), *Spanich v. Reichelderfer*, 90 Ohio App. 3d 148, 153-155 (1993); *Weinstein v. Mintz_*, 148 Misc.2d 820, 832 (New York 1990); *Yome v. Gorman*, 152 N.E. 126 (1926); *Feller v. Universal Funeral Chapel, Inc.*, 124 N.Y.S.2d 546, 551 (1953)). Washington's statutory framework exists to identify easily ascertainable next of kin decision-makers without the need to engage in intrusive and burdensome factual considerations of the status of the marriage relationship at the time of death or the location of the remains of a decedent's family members. Ms. Braun's encouragement that the court permit discovery into such things is wholly irrelevant to this court's inquiry. *See* Appellant's Opening Br. 22-24.

Unlike in the non-Washington cases cited by Ms. Braun, summary judgement was proper in this case because Washington's statutory framework is dispositive. *See* RCW 68.50.200. This court need not reach any equitable considerations present in the cases Ms. Braun cites. *See* Appellant's Opening Br. 28 (citing *Matter of Briggs v. Hemstreet-Briggs*, 681 N.Y.S 2d 853 (1998); *Matter of Dutch v. Paradise*, 629 N.Y.S.2d 501 (1995); *Spadaro v. Catholic Cemeteries*, *supra*, 278 S.W.3d at 118-119 (2008)).

basis of where other members of the decedent's family are buried, Ms. Braun cites *Yome v. Gorman*, 152 N.E. 126 (1926). The court in *Yome* actually decided the case based on the clearly expressed desires of the decedent, finding that the decedent had expressed a desire to be buried in accordance with Catholic tradition and that to move his remains from consecrated ground would be contrary to that wish. *Yome*, 152 N.E. at 128. Second, for the proposition that reinterment can be justified on the basis of the strength of relationship between the interested parties and the decedent, Ms. Braun cites *Spanich v. Reichelderfer*, 90 Ohio App. 3d 148 (1993), and *Feller v. Universal Funeral Chapter*, 124 N.Y.S.2d 546 (1953). The relationship contemplated in *Spanich*, however, was one in which the husband and wife had been living apart for more than two years, and the wife had looked into divorce after the husband forged $40,000 in checks in the wife's name. *Spanich*, 90 Ohio App. 3d at 150. The relationship in *Feller* was one in which the husband and wife had been separated for several years and in which the husband was openly consorting with another woman. *Feller*, 124 N.Y.S.2d at 547-49. Ms. Braun's attempt to draw parallels to these cases are unpersuasive in the face of Washington's statutory scheme and the absence of any assertion that Ms. Selig and Mr. Faenov were not living together at the time of his death. "[S]peculative and argumentative assertions" are insufficient to

survive a motion for summary judgment and do not warrant additional discovery. *Adams*, 164 Wn.2d at 647.

The case law Ms. Braun cites also echoes the equitable considerations evident in Washington common law: the wishes of the decedent should be considered above all, and "[t]he dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose." *Yome*, 152 N.E. at 129. "Even without contract, sentiments and usages, devoutly held as sacred, may not be flouted for caprice." *Id.* at 128-29.

In this case, Ms. Selig, as the surviving spouse, holds the exclusive statutory right to control the continued disposition of her husband's remains. These decisions are hers alone to make. Ms. Braun has presented no evidence and alleged no facts to indicate that Kyril clearly expressed his sincere hope to be buried in Portland instead of Seattle. She also has not presented evidence or alleged facts sufficient to demonstrate a reasonable necessity to disturb Kyril's remains. As a matter of equity, the superior court did not abuse its discretion in holding that the facts and circumstances present in this case do not justify judicial intervention.

D. The Superior Court Did Not Abuse its Discretion by Denying Ms. Braun's Motion for Additional Discovery Because Ms. Braun Was Not Deprived of the Ability to Advocate in Support of Her Position; Discovery Was Not Necessary for Ms. Braun to Make Her Arguments to the Court

At the hearing, the trial judge denied Ms. Braun's Motion for Additional Discovery pursuant to Rule 56(f), RP at 49:4-8, holding that the record was complete for purposes of deciding the pending motion, RP at 19:18-21. CR 56(f) provides that, if a party opposing a motion for summary judgment "cannot, for reasons stated, present by affidavit facts essential to justify his opposition," the court may, in its discretion, deny the motion for summary judgment, or allow time for additional discovery. CR 56(f). "The trial court's decision to order additional discovery pursuant to CR 56(f) is discretionary and reversible only for *manifest* abuse of discretion." *Hewitt v. Hewitt*, 78 Wash. App. 447, 455, 896 P.2d 1312 (1995) (emphasis added). "'Rule 56(f) requires affidavits setting forth particular facts expected from the movant's discovery. A Rule 56(f) motion must show how additional discovery would preclude summary judgment and why a party cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact.'" *Id.* (quoting *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 523–24 (9th Cir. 1989)). In Ms. Braun's Rule 56(f) Motion, she requested discovery relating to twenty-four different topics she claimed were reasonably calculated to lead to

evidence of relevant facts, including thirteen enumerated facts. (CP at 511-15.)

During the hearing, counsel for Ms. Braun stated that, "the Court has before it sufficient evidence and argument to rule in our favor" but reserved that, "if the Court has any inclination to grant the motion or a portion of the motion, then I've done my best under the declaration to lay out where we think more discovery should be had under Rule 56(f)." RP at 19:8-9; 19:23-20:1. Following the judge's decision, counsel added that "I did not believe that we were arguing the equitable issues before the Court" and "my briefing would have been extensively different, and my request for additional discovery would have been different, and I would have provided a lot more information before the Court." RP at 49:13-23. The judge reiterated that "I don't see a need to look at years of records from the cemetery or other additional facts or testimony besides what's been presented." RP at 50:16-18. Ms. Braun now argues that the Court erred by dismissing her Petition to Reinter "without providing her adequate notice and opportunity to be heard on the facts, circumstances and equities at issue." Appellant's Opening Br. 4. This argument is disingenuous and does not accurately characterize the arguments Ms. Braun has presented consistently throughout these proceedings.

Ms. Braun repeatedly presented her equitable arguments[3] in an attempt to demonstrate that she is better suited to determine the placement of Mr. Faenov's remains than is Ms. Selig. The record is replete with her factual assertions[4] relating to the equitable analysis Ms. Braun urges this

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[3] Ms. Braun presented arguments attempting to draw upon case law in Washington and other jurisdictions to claim that the court has equitable jurisdiction and that the equitable considerations favor reinterment. (*See, e.g.*, CP at 295-297 (section arguing that the location of Kyril's remains should be determined on principles of equity); CP at 385-405 (reciting facts relating to equitable considerations; repeatedly citing Marsh Declaration; arguing that, in equity, Ms. Selig does not have the exclusive right to control her husband's remains); CP at 406-461 (detailing the equitable jurisdiction of courts under common law).)

[4] In Ms. Brauns's pleadings and supporting declarations, (CP at 1-9, 15-40, 288-299, 385-547), she alleges that Kyril was buried in "essentially an unmarked grave," (CP at 1), that he "no longer has any family living in Seattle," (CP at 1-2), that Ms. Selig "has opposed any efforts to memorialize his gravesite or preserve his memory," (CP at 2), that in Portland Kyril's remains would be "surrounded in memoriam by family" and that his "memory [would] be honored and preserved," (CP at 2), that Kyril came from a close knit family that petitioned to bring his grandparents to the United States from Russia, (CP at 2), that he returned to Portland for school breaks, (CP at 2), that he remained an Oregon resident while in school, (CP at 2), that he started his career in Portland and lived with his mother and step-father there, (CP at 2), that after moving to Seattle, he still visited Portland frequently, (CP at 3), that his step-father named him personal representative of his estate, (CP at 3), that his grandparents are buried in Portland and his mother will be as well, (CP at 3), that a site has been reserved there for him, (CP at 5), that plans for Kyril's funeral were made without consulting Ms. Braun, (CP at 3), that Ms. Selig removed public access to Kyril's personal website and memorial website, (CP at 3-4), that Ms. Selig did not allow Ms. Braun to see her grandchildren, (CP at 3-4), that Ms. Selig changed her children's last names, (CP at 4), that she moved with the children to California, (CP at 4), that she did not immediately place a headstone and removed the headstone

Court to adopt. The attached exhibits to Ms. Braun's pleadings include pictures pulled from twitter, (CP at 24, 492), email exchanges, (CP at 469-75, 479-81, 503-09), photos of text messages, (CP at 477), internet screen shots, (CP at 489-90, 497-98), and photos of Kyril's grave, (CP at 27, 29, 31, 33). Throughout her pleadings, Ms. Braun repeatedly argued that the equities favored her choices over those of Ms. Selig's. (*See, e.g.*, CP at 464-67, 546.) Ms. Braun cannot claim that she did not have adequate opportunity to present her equitable arguments.

In addition, the court considered Ms. Braun's arguments regarding the equitable considerations before deciding to deny her Petition. (RP at 5:9-13, 47:8-49:15.) The court correctly held that "moving remains is a decision that can't be made lightly and should not be allowed, absent some compelling circumstances in which equity requires it." (RP at 47:9-11.) Further, the court found that "as an equitable matter, and based on the facts and circumstances that I see in the record, I don't see a sufficient reason, I don't see a necessity or a compelling equitable reason to disturb the decision of Lauren Selig, the surviving spouse, as its been implemented in the interment agreement her father signed." (RP at 47:12-

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placed without her permission by Kyril's friends, (CP at 4-5), that Jewish tradition favors burying loved ones close to surviving family members, (CP at 6), and that Jewish law requires placement of a headstone, (CP at 6). (*See also* CP at 546 (reciting facts relating to equitable considerations)).

17.) Because the court's decision was based on the "facts and circumstances . . . in the record," including all the facts and circumstances Ms. Braun repeatedly alleged and referenced in her pleadings, Ms. Braun had an adequate opportunity to be heard on her advocacy regarding "the equities."

V. CONCLUSION

This dispute arises out of Ms. Braun's desire to replace Ms. Selig as the person authorized to make decisions regarding the disposition of the remains of Ms. Selig's husband and the maintenance of his gravesite. Ms. Braun does not argue that Ms. Selig has failed to honor any of the decedent's wishes. Strong public policy dictates that courts cannot be placed in the position of resolving family disputes regarding the proper procedures and locations for the burial of loved ones. The Legislature has designated a hierarchy for just this reason; cemeteries are entitled to rely on those hierarchies and on the interment agreements they sign. Under Washington's statutory scheme, Ms. Selig has the legal right to make these decisions, and Ms. Braun's Petition does not present an equitable necessity for the court to interrupt that right.

RESPECTFULLY SUBMITTED this _____ day of August, 2015.

LANE POWELL PC

By 

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the United States and the State of Washington, that on August 7, 2015, I served a copy of the foregoing document on all counsel of record as indicated below:

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Executed at Seattle, Washington, this 7thday of August, 2015.

Terri L. Potter